Supreme Court, U.S.
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No. 06-137

In The Supreme Court of the United States

CRAIG MICHAEL HASKELL,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

REPLY BRIEF

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

BEVERLY B. MANN
P.O. Box 20
Whitmore Lake, Michigan 48189
(248) 767-4895

THOMAS N. KASHICKEY
38 Church Street
Basking Ridge, New Jersey 07920
(201) 788-2170

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Contrary to the State's assertion, each of the issues presented in the petition for a writ of certiorari was expressly raised in the Michigan state courts and is properly before this Court. Each presents an issue of national importance on which the Circuits and states are split.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION FOR A COURT TO IMPOSE A GREATER SENTENCE BECAUSE A DEFENDANT EXPRESSES HIS INNOCENCE AT THE SENTENCING PHASE.

Craig Haskell has claimed from the time of his arrest to this day that he is innocent and that no sexual assault ever occurred. It must be remembered that this is a case where there was no physical evidence of rape, where the victim did not mention rape when she first spoke to the police, and where the victim told hospital personnel that no rape occurred. App. at 13; (Tr. II, 16-17, 21, 47). The only evidence of rape was the victim's assertions at trial. At the sentencing proceeding, Haskell declared his innocence. He stated: "I know that one day the truth will come out and I stand before you an innocent man." Appendix to Petition for a Writ of Certiorari ("App.") at 39.

The State, of course, does not deny that the trial judge responded to this by imposing a greater sentence on Haskell because of his failure to show remorse. The trial judge stated: "I don't see any remorse in this case. None. . . . And it's bothersome to me. . . . The only question I have is how much above the minimum I should go." App. at 43. The judge then said, "I don't see a thread or thimble of remorse or reaching out to the victim in this case and

saying I'm sorry for what you have been put through." App. at 44.

The State says that Michigan law does not allow greater punishment to be imposed on a person for expressing innocence, Brief in Opposition ("Br. Opp.") at 8, but that Michigan law permits punishment for lack of remorse. *Id.* at 11. But this is a distinction without a difference. In this instance, the sole evidence of lack of remorse was Haskell's continued claim of innocence. As the judge indicated, Haskell would have received a lesser sentence if only he admitted his guilt and apologized to the victim, even though he has steadfastly maintained his innocence. The State says that there is often a "fine line between taking into account a lack of remorse and punishing a defendant for claiming innocence." Br. Opp. at 11. But in this case there was no line at all; a greater sentence was imposed because Haskell claimed his innocence. Under the State's argument there is simply no way for a defendant to express his or her innocence without being punished for failing to show remorse.[1]

Thus, the issue is clearly posed as to whether it violates the privilege against self-incrimination or due process to impose greater punishment on a person simply for claiming to be innocent. The State is wrong in its assertion that Haskell failed to preserve this issue. Br. Opp. at 6. For example, in the Michigan Court of Appeals, the first heading in Haskell's brief on appeal was:

> I. Craig Haskell maintained his innocence at sentencing in the statements he made to the court. In passing sentence the court repeatedly referred to Haskell's statements and tried to get

[1] The State also argues that the lack of remorse is relevant because it relates to the likelihood of rehabilitation. Br. Opp. at 11 n.11. But this begs the question presented by this case as to whether the Constitution allows a defendant's claim of innocence to be used as the sole basis for a court finding a lack of remorse.

> him to admit guilt. The court violated Haskell's Fifth and Sixth Amendment rights by considering his refusal to admit guilt in its sentence. Further the trial court incorrectly scored the sentencing guidelines. For all of these reasons, Haskell is entitled to a resentencing.

Defendant-Appellant's Brief on Appeal, at 9. The State did not argue in the Michigan Court of Appeals that this issue was waived and the court expressly addressed it, rejecting Haskell's argument. App. at 14-15. Haskell again raised this in his petition for review to the Supreme Court of Michigan. *See* Defendant-Appellant's Corrected Application for Leave to Appeal at 4.

Finally, the issue of whether a defendant can suffer greater punishment for claiming his or her innocence is an issue that constantly arises and that has divided the lower courts. Contrary to the State's assertion, Br. Opp. at 9-10, this is exactly the issue posed by the cases described in the petition for a writ of certiorari. Several courts have held that a defendant may not receive a greater sentence for maintaining his or her innocence. *See, e.g., State v. Imlay*, 249 Mont. 82 (1991); *United States v. Wright,* 533 F.2d 214, 215-16 (5th Cir. 1976); *United States v. Laca*, 499 F.2d 28, 927-28 (5th Cir. 1974). But other courts have held that a defendant may receive a greater sentence for maintaining his or her innocence in that this indicates a lack of remorse. *See, e.g., Williams v. Stewart*, 2 F.3d 205, 207 (7th Cir. 1993); *United States v. McClain*, 2 F.3d 205, 207 (7th Cir. 1993); *United States v. Ford*, 840 F.2d 460, 466-67 (7th Cir. 1988). Each of these cases involved the question of whether greater punishments can be imposed on a defendant for refusing to admit guilt and maintaining his or her innocence. In fact, this Court previously has recognized this as an important issue that it has not yet decided. *See, e.g., Mitchell v. United States*, 526 U.S. 314, 330 (1999) ("The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of

the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse . . . is a separate question. It is not before us, and we express no view on it.")

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT.

The State does not dispute that Haskell received a much longer sentence because the trial judge found a "continuing pattern of criminal activity" based on four alleged sexual contacts that occurred within a few minutes. In fact, the State concedes that Michigan law allows a "a continuing pattern of criminal activity" to be based on all of the crimes, even if they occur within a few minutes. Br. Opp. at 15. In other words, if two people get in a fight and one throws four punches, each could be a separate battery and then the four together could be deemed a "continuing pattern of criminal activity" as the basis for a much longer sentence. That is what happened in this case.

This raises important constitutional questions. Does it violate due process, as patently unfair, to punish a person for a "continuing pattern of criminal activity" when all the events occur within minutes? *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (due process is violated by procedures that are "fundamentally unfair or arbitrary.") Is the phrase "continuing pattern of criminal activity" unduly vague because courts across the country are split as to whether this can be based on actions that occur at the same time? *Compare United States v. Grande*, 353 F.Supp.2d 623, 633 (E.D. Va. 2005); *Wilson v. Florida*, 776 So.2d 347 (Fla. 2001) (events at the same time cannot be a

basis for finding a continuing pattern of criminal activity); *with Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) (events at the same time can be the basis for finding a continuing pattern of criminal activity).

Moreover, there is a flat out split among the lower courts as to whether a "continuing pattern of criminal activity" must be found by the jury in light of this Court's decision in *Blakely v. Washington*, 542 U.S. 961 (2004). *Compare Isaac v. State*, 911 So.2d 813, 814 (Fla. 2005); *State v. Perez*, 196 Ore.App. 364, 372-73, 102 P.3d 705 (Ore.App. 2004), *rev'd on other grounds,* 340 Ore. 310, 131 P.3d 168 (Ore. 2006) (the jury must find a continuing pattern of criminal activity); *with State v. Rivers,* 130 Wash.App. 689, 128 P.3d 608 (Wash.App. 2005); *People v. Felder*, 129 P.3d 1072 (Colo.App. 2005) (jury need not find continuing pattern of criminal activity in order for the judge to increase the sentence).

The State makes two responses. First, the State argues that the jury found the defendant guilty of four acts of sexual misconduct that occurred within a few minutes. Br. Opp. at 15. Although this is true, the judge imposed a greater punishment than would be based on these four acts by concluding also that they were a "continuing pattern of criminal activity." The jury never was asked whether these four acts, all of which occurred within a few minutes, were a "continuing pattern of criminal activity." Thus, the issue, in part, is whether under *Blakely* it should have been for the jury to decide whether there was a "continuing pattern of criminal activity."

Second, the State argues that this issue was not preserved in the lower courts. Again, this is wrong. Haskell's brief on appeal explained that the trial judge erred "because it would constitute impermissible double counting. Impermissible double counting occurs when precisely the same aspect of the defendant's conduct factors into his sentence in separate ways." Defendant-Appellant's Brief

on Appeal at xxiii. The Michigan Court of Appeals considered the defendant's argument and rejected it. App. at 15-16. The issue is thus preserved and squarely presented as to whether a defendant may be punished for a continuing pattern of criminal activity when all the criminal events occur within a very short time.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT FOR A TRIAL JUDGE TO INCREASE A SENTENCE BY FINDING FACTS THAT DIRECTLY CONTRAVENE THE JURY'S VERDICT.

The State asserts as fact that "Petitioner then grabbed a pair of scissors which had been lying on the bed." Br. Opp. at 2. The prosecutor had argued that Haskell had used them to threaten the victim. But the jury found Haskell not guilty of using a weapon. (Tr. V, 19). As explained in the petition for a writ of certiorari, the jury surely did this because no scissors were ever found; neither the victim's mother nor the officer who photographed the room ever saw any scissors; and the victim told conflicting stories about what happened to the scissors. Petition for a Writ of Certiorari, at 16-17.

Notwithstanding this express finding by the jury, the trial judge said that the jury's "verdict was an opinion" (App. at 26) and imposed a greater sentence on the grounds that "the offender possessed" a "cutting or stabbing weapon." MCL 777.32. In other words, Haskell's sentence was increased because the judge found a fact that directly contravened the jury's verdict.

Haskell objected in the Michigan state courts that this violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 961 (2004). The State is

wrong in saying that Haskell waived this objection. Br. Opp. at 18. This was expressly presented in the Michigan courts. *See* Defendant-Appellant's Brief on Appeal at xxv-xxvi. The Michigan Court of Appeals rejected Haskell's argument not by saying that it was waived, but rather by concluding that "*Blakely* does not apply to Michigan's sentencing guideline system." App. at 15. The State repeats the Michigan Court of Appeal's argument, contending that since Michigan law sets both the minimum and maximum sentences, *Apprendi* and *Blakely* do not apply. Br. Opp. at 19-20. But *Blakely* holds that any fact, other than a prior conviction, that leads to a sentence greater than that which could be based on the jury's verdict or the defendant's admission, must be proven to a jury beyond a reasonable doubt. 542 U.S. at 303-04.

The State, of course, is correct that *Blakely* involved a sentencing guideline system, whereas this case involves an indeterminate sentencing system. But the important question, not yet considered by this Court, is how *Blakely* should be applied to this type of sentencing system. Michigan law sets the minimum sentence for an offense and the statute also provides a series of factors that warrant enhancements. *See* Br. Opp. at 12-13. The issue which has not yet been decided by this Court is whether a judge, in a sentencing system like Michigan's, may increase a sentence based on facts contrary to the jury's verdict. May a judge find that statutory enhancements are present when the jury came to an opposite conclusion?

Contrary to the State's assertion, the Michigan sentencing system is nothing like *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where this Court held that jury's do not need to find the facts that lead to mandatory minimum sentences. In *United States v. Harris*, 536 U.S. 545 (1982), this Court reaffirmed *McMillan* and held that *Apprendi* does not apply to mandatory minimum sentencing systems. But Michigan does not impose mandatory minimum sentences. Rather, Michigan law sets a minimum and a maximum, with judges increasing sentences above the

minimum by finding statutory enhancements to be present. The issue presented by this case is whether a statutory enhancement that leads to a greater sentence than the minimum may be found by the judge by a preponderance of the evidence, or whether it must be proven to a jury beyond a reasonable doubt.

It is this question that divides the lower courts. The petition for a writ of certiorari identifies a number of lower courts that have differed over the issue of whether the judge may find factors that increase sentences above the jury's verdict. Pet. Writ Cert. at 19. The State's response is that none of these sentencing systems are like Michigan's. Br. Opp. at 21-23. But this misses the point. Whether the system is determinate or indeterminate, the issue arises as to whether a judge can impose a sentence greater than could be based on the jury's verdict by finding facts that are contrary to the jury's conclusions.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A CONFLICT AMONG THE LOWER COURTS AS TO WHEN THERE MUST BE A HEARING TO DETERMINE IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL.

This is a case where there is very substantial evidence of ineffective assistance of counsel. As explained in the petition for a writ of certiorari, as of the evening before the trial, the defense counsel had done no preparation on an insanity defense based on the defendant's suffering Complex Partial Seizure disorder, even though it was clear that this was to be the primary defense especially as to the battery claim. The trial counsel had not spoken to Haskell's treating physician or arranged any expert witnesses. Pet. Writ Cert. at 21. Also, the trial attorney failed to file the requisite notice so that the alleged victim's prior sexual relationship with Haskell could be raised. *Id.* at 23. As a result, as the Michigan Court of Appeals acknowledged, this could not be presented to the jury and Haskell

never could present a crucial aspect of his defense: that the victim accused him of rape to hide her sexual relationship from her parents. App. at 12-13. When Haskell discharged his lawyer, the attorney retaliated by lying to the judge about having received threats from Haskell. Pet. Writ Cert. at 22. This caused the judge to incarcerate Haskell, which directly prevented him from receiving the physical tests his lawyers needed to establish his defense. *Id.* at 22.

The issue is whether a hearing on ineffective assistance of counsel was required under these circumstances. Again, contrary to the State's assertion, Haskell did not waive this. He filed a "Motion to Remand for a *Ginther* Hearing to Develop a Testimonial Record on Ineffective Assistance of Counsel." *See People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973) (providing a hearing on the issue of ineffective assistance of counsel). The State asserts that this was not preserved in the Michigan Supreme Court. Br. Opp. at 25. Quite the contrary, the petition for review in the Michigan Supreme Court stated:–

> X. Haskell was denied his Sixth Amendment right to the effective assistance of counsel, and there is a reasonable possibility that, absent this, the outcome of the trial would have been different.

Defendant-Appellant's Corrected Application for Leave to Appeal, at 49.

There is a major, unresolved issue of when courts must grant a hearing on the issue of ineffective assistance of counsel. Lower courts are clearly divided on this issue. *Compare, e.g., United States v. Graham*, 2006 WL 1196250 (10th Cir. 2006); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005); *United States v. Davis*, 159 Fed.Appx. 814 (9th Cir. 2005) (requiring an evidentiary hearing on ineffective assistance of counsel), *with United States v. Walters*, 163 Fed.Appx. 164 (10th Cir. 2006); *Goldsby v. United States*, 152 Fed.Appx. 431 (6th Cir. 2005) (no evidentiary hearing warranted on whether there was

ineffective assistance of counsel). This case presents the Court an important opportunity to resolve an issue that constantly arises across the country as to when a factual hearing is necessary on a constitutional claim of ineffective assistance of counsel.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY
SCHOOL OF LAW
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

BEVERLY B. MANN
P.O. Box 20
Whitmore Lake, Michigan
48189
(248) 767-4895

THOMAS N. KASHICKEY
38 Church Street
Basking Ridge, New Jersey 07920
(201) 788-2170
Attorneys for Petitioner